17-0428

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

LOUIS FLORES,

Appellant-Plaintiff,

v.

UNITED STATES DEPARTMENT OF JUSTICE,

Respondent-Defendant.

SUR-REPLY BRIEF OF APPELLANT LOUIS FLORES

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III. PRELIMINARY STATEMENT

Plaintiff-Appellant Louis Flores ("Flores") has shown that Defendant-Respondent United States Department of Justice ("DOJ," the "Agency," or the "Government") was in deliberate violation of FOIA, and the Government admits it was not in compliance with FOIA. Accordingly, Plaintiff-Appellant respectfully requests that this Court review *de novo* the issues overlooked by the District Court, to remand this case to the District Court with orders for relief, including instructions to enter orders for sanctions, penalties, and fines against the Government.

Because Plaintiff-Appellant is unable to file a Supplemental Appendix due to economic reasons, Plaintiff-Appellant expects this Court, for purposes of this Appeal, to review all of the pleadings and documents filed with the District Court in the conduct of the *de nono* review of the District Court's proceedings. In connection therewith, Plaintiff-Appellant incorporates and adopts for this sur-reply brief some of the legal standards for this Court to consider by reference to some of the pleadings filed with the District Court.

A. FOIA : STANDARD OF REVIEW ON SUMMARY JUDGMENT

Plaintiff-Appellant incorporates by reference the summary judgment legal standard for review for FOIA in Plaintiff's brief to support his motion for partial summary judgment. (Dkt. No. 24-1 at 8-11).

B. THE FIRST AMENDMENT

Plaintiff-Appellant incorporates by reference the legal standard for review for the First Amendment in Plaintiff's brief to support his motion for partial summary judgment. (Dkt. No. 24-1 at 11). *See also* U.S. Const. amend. I.

C. RULE 52

Plaintiff-Appellant incorporates by reference the legal standard for review for Rule 52 in Plaintiff's brief to support his motion for sanctions. (Dkt. No. 25-1 at 11-2).

D. SANCTIONS

Plaintiff-Appellant incorporates by reference the legal standard for review for sanctions in Plaintiff's brief to support his motion for sanctions. (Dkt. No. 25-1 at 12-3).

IV. ARGUMENT

A. THE AGENCY ACTED IMPROPERLY

The Government has an obligation to comply with FOIA. 5 U.S.C. § 552. The Government has an obligation to comply with the spirit of FOIA. *See* Barack Obama, *Memorandum of January 21, 2009 : Freedom of Information Act* (Jan. 26, 2009), 74 Fed. Reg. 4683, http://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/presidential-foia.pdf (noting that, "In responding to requests under the FOIA, executive branch agencies (agencies) should act promptly and in a spirit of cooperation, recognizing that such agencies are servants of the public."). Therefore, the Government may not comply with FOIA at its sole discretion.

The Government never processed the First FOIA Request, the FOIA Appeal, and then withheld records from disclosure. The Agency's refusal to process the First FOIA Request, its withholding of the *Vaugh* Index, and its assertion that it can comply with FOIA at its sole discretion constitute a *Glomar* response, to which Plaintiff-Appellant has objected. *Phillippi v. CIA* ("Phillippi I"), 546 F.2d 1009 (D.C. Cir. 1976). What is more, the Government submitted defective Declarations in the proceedings before the District Court.

Not surprisingly, Plaintiff-Appellant objected to the Government's numerous acts of bad faith and amended the Complaint to reflect as much. (Dkt. No. 15). The Agency was in violation of FOIA for two years. (Dkt. No. 25-1 at 14-5). The DOJ wrongly claimed it could comply with FOIA at its sole discretion. (Dkt. No. 25-1 at 15-6). The DOJ submitted defective Declarations. (Dkt. No. 25-1 at 16-20). The DOJ wrongly claimed it lost the First FOIA Request, wrongly closed out the First FOIA Request, and then opened a new FOIA Request for the First FOIA Request. (Dkt. No. 25-1 at 20-3). The DOJ wrongly cliamed that Assistant U.S. Attorney Angela George ("George") did not have a copy of the United States Attorneys' Manual. (Dkt. No. 25-1 at 23-5). The DOJ refused to, and did not, produce a *Vaughn* Index, as required. (Dkt. No. 25-1 at 25-6). The DOJ did not cliam Exemptions for withheld documents, and the DOJ has waived its Plaintiff-Appellant moved for sanctions, penalties, and fines. (Dkt. No. 25).

B. THE AGENCY'S IMPROPER ACTS VIOLATED FOIA

Despite the Government's obligation to comply with FOIA and the spirit of FOIA, Government has plainly refused to confirm or deny the existence of guidelines, procedures, policies, and/or protocols for the prosecution of the activists. In order to falsely make this argument, the

Government informed this Court that the District court "considered the entirety" of the First FOIA Request. (Gov't Brief at 31). Plaintiff-Appellant will address this misrepresentation in Section D. below. Furthermore, the Government asserted to this Court that the Government considered the entirety of the First FOIA Request "in conducting searches for any responsive records." (Gov't Brief at 31). Both of the Government's assertions are false.

In respect of the Government's false assertion that it considered the entirety of the First FOIA Request, such assertion is not supported by the series of defective Declarations submitted by the Government to the District Court. Over and over, Plaintiff-Appellant has noted that the Government did not consider the "four corners" of the First FOIA Request, the Government's false assertions nothwithstanding. (Gov't Brief at 21). Plaintiff-Appellant demonstrated time and again that the Government did not provide a full accounting for all 18 request items in the Government's Declarations, the Government's false assertions nothwithstanding. (Gov't Brief at 21). Plaintiff-Appellant has requested an item-by-item clarification of the Ageny's search for records. (Flores Decl., Ex. I at ¶ 1(i)). However, the DOJ did not provide this item-by-item clarification. (Flores Decl., Ex. J). In spite of its failure to provide

an item-by-item clarification, as well as answer the many requests for clarification and the conduct of routine due diligence by Plaintiff, the DOJ represented to the District Court that the DOJ made "a response" to Plaintiff's Due Diligence Letter. "On November 3, 2015, Defendant provided a response to Plaintiff's October 26, 2015, letter, which Plaintiff-Appellant argues is only a partial response." (Dkt. No. 18 at 2). The DOJ's response was another bad faith act, because it was far less than "a partial response," because the DOJ only answered two requests for clarification out of many that were requested. (Flores Decl., Ex. J).

Rather than provide Declarations or Affidavits of important officials, the Government provided second-hand statements of these officials. In respect of an individual believed to be **ANGELA GEORGE** ("George"), the Government provided statements allegedly attributed to Geroge without George having to attest or certify to her statemnets. *See* Kelly Decl. (Dkt. No. 20-6, ¶ 16-8, 22). In respect of unnamed individuals identified as the Chiefs of the USAO-DC's Appellate Division, Criminal Division, Special Proceedings Division, and Superior Court Division in one of the Declarations provided by the Government, the Government failed to provide attestations or certifications for the statements attributed to the Chiefs of the USAO-DC's Appellate Division,

Criminal Division, Special Proceedings Division, and Superior Court Division. *See* Van Horn Decl. (Dkt. No. 41, ¶ 13). In a trial, this misconduct would be objected to as providing heresay.

C. THE AGENCY IMPOPERLY WITHHELD AGENCY RECORDS

The Government's obligation to comply with FOIA includes an obligation to provide its "working law." *See Brennan*, 697 F.3d 184, 195-96, 199-202. This includes an agency's opinion about "what the law is" and "what is not the law and why it is not the law." *Tax Analysts II*, 117 F.3d 607, 617. An agency document constitutes working law, and thus must be disclosed, if it "has become" an agency's "*effective* law and policy." *Brennan*, 697 F.3d at 199 (quoting *NLRB v. Sears, Roebuck, & Co.*, 421 U.S. 132, 153 (1975)) ("*NLRB II*") (emphasis added) ; *see Coastal States Gas Corp. v. Dep't of Energy,* 617 F.2d 854, 868 (D.C. Cir. 1980) ("[T]o prevent the development of secret law within the Commission, we must require it to disclose orders and interpretations which it actually applies in cases before it."). Crucially, the working-law doctrine does not require that a position expressed in a document be "absolutely binding" on an agency; it need only reflect a "settled and established policy." *Pub. Citizen, Inc. v. OMB,* 598 F.3d 865, 875 (D.C. Cir. 2010). Similarly, legal

interpretations "routinely used" and "relied on" fall within the definition of working law. *Coastal States,* 617 F.2d at 869.

The legal analysis of the prosecution of activists that has become the Government's "working law" must be disclosed under FOIA when that analysis describes the process that Agencies must follow in order for their actions to be legal and particularly since Executive officials have repeatedly stressed the legality of activists engaged in activism.[1/] [2/] The District Court aided the Government to withhold records when the District Court (R. Mann), in its Report and Recommendation, wrongly held that "nothing beyond mere speculation undergirds [P]laintiff's assertions" that responsive records exist. (Dkt. No. 48 at 27). Records have been shown to exist. For example, when the Federal Bureau of Investigation ("FBI") begins an investigation of activists under one of the DOJ's guidelines, the FBI will consult with an U.S. Attorney. (Flores Decl., Ex. G at Tab D). *See* U.S. Dep't of Justice, *United States Attorneys' Manual* § 9- 65.881. Under the same section, there is legal advice given to the DOJ

[1/] *See* Barack Obama, *President Obama Delivers a Statement on the Ferguson Grand Jury's Decision*, White House (Nov. 24, 2014), https://www.whitehouse.gov/blog/2014/11/24/president-obama-delivers-statement-ferguson-grand-jurys-decision.

[2/] *See* Holly Yan and Catherine E. Shoichet, *Ferguson fallout : Protesters interrupt Holder's speech*, CNN (Dec. 2, 2015), http://www.cnn.com/2014/12/01/us/ferguson-up-to-speed/.

by the U.S. Department of State ("DOS") about criminal charges being disposed under local law. *Id*. (Dkt. 25-1 at 26, n. 16). The showing that this legal advice exists is based on a disclosure in the United States Attorneys' Manual, thus not based on "mere speculation." Plaintiff-Appellant has requested the disclosure of this legal advice. "The legal advice from the DOS must be produced, because the DOJ has not invoked any Exemption for the legal advice. The legal advice from the DOS exists, governs during demonstrations, and the legal advise from the DOS must be produced." (Dkt. 50 at 13). Other records have been shown to exist. For example, one of the Government's Declarants has admitted that six boxes of records exist for the prosecution file of **LT. DANIEL CHOI** ("Lt. Choi"). (Van Horn Decl., ¶ 11). Those records need to be produced. There is no legal controversy over Plaintiff's right to demand that the DOJ be in compliance with FOIA, and the only documents subject to Exemption are the privacy-encumbered records (the "Exempted Records") withheld by the DOJ from the First FOIA Response (the "Red Herring Response") pertaining to Lt. Choi, for which Plaintiff-Appellant has requested a *Vaughn* Index. (Dkt. No. 12, Ex. A at 2, B at ¶ 46). (Flores Decl., Ex. I at ¶ 4j(i)- (ii)). (PL 56.1 Answer at ¶ 8.1e). (Flores Decl., Ex. F).

Furthermore, the sole time when the District Court ruled in Plaintiff's favour, the District Court ordered the DOJ to conduct a search of Main Justice and to produce at least some of the records on Plaintiff's Index of References to Records Requested under the FOIA Request. (Dkt. No. 12 at Ex. B). The District Court's ruling in favour of Plaintiff-Appellant carried significant weight. The Court of Appeals for the District of Columbia has ruled that " 'agencies [may] not make new exemption claims to a district court after the judge has ruled in the other party's favor,' nor may they 'wait until appeal to raise additional claims of exemption or additional rationales for the same claim.' " *Senate of P.R. v. DOJ*, 823 F.2d 574, 580 (D.C. Cir. 1987) (quoting *Holy Spirit Ass'n v. CIA*, 636 F.2d 838, 846 (D.C. Cir. 1980)). *See also Tax Analysts v. IRS*, 152 F. Supp. 2d 1, 25-26 (D.D.C. 2001) (*"Tax Analysts III"*) (refusing to revisit issue of attorney-client privilege, because the Court ruled on attorney-client privilege issue in previous opinion), *aff'd in pertinent part, rev'd in part*, 294 F.3d 71 (D.C. Cir.). Because the Agency did not invoke any Exemptions to any of the documents listed on Plaintiff's Index of References to Records Requested under the FOIA Request, Plaintiff-Appellant has claimed all of those documents under the First FOIA Request, and all of those documents are produceable. Because some of

the DOJ's working law takes the form of opinions about whether charges should be brought against activists, like those listed on Plaintiff's Index of References to Records Requested under the FOIA Request, the Agency must be made to produce all of the records referenced in Plaintiff's Index of References to Records Requested under the FOIA Request. This will be further discussed in Section D. below.

Contrary to the Government's arguements, Plaintiff-Appellant was not enaged in "oblique allegations and rank specuation." (Gov't Brief at 24). It is not mere "conjecture" that records exist. (Gov't Brief at 26). Plaintiff-Appellant made showings that records exist. The DOJ has a duty to comply with FOIA, and when the DOJ breaches that duty, it is acting in bad faith. The bad faith acts and violations of FOIA should raise questions about the DOJ's credibility in proceedings before this Court.

D. THE DISTRICT COURT MADE SERIOUS ERORRS

The Government was never held accountable for its misconduct, including submitting altered documents into the District Court's record, which the Government only finally now admitted. (Gov't Brief at 32).

The District Court aided the Government to withhold records when the District Court wrongly held that "nothing beyond mere speculation undergirds [P]laintiff's assertions" that responsive records exist. (Dkt. No. 48 at 27). Records have been shown to exist, as referenced in the United States Attorneys' Manual and in one of the Declarations submitted by the Government in this litigation. Because the Government has not disclosed its working law, undisclosed records are highly likely to exist. Since these showings created a material dispute in the facts, the District Court was wrong to grant the Government's motion for summary judgement. And because the District Court ruled against Plaintiff-Appellant, FOIA makes available relief, since Plaintiff-Appellant has a claim on the undisclosed records. 5. U.S.C. § 552(a)(4)(B).

Plaintiff-Appellant showed that there were a littany of facts in dispute and the absence of the existence of facts. The District Court, in the Report and Recommendation, ignored the absence of material facts. (PL 56.1 Answer ¶¶ 13, 25, 27-28, 32-38, 43, 46-50, 53-55, 75, and 81.). The absence of material facts was sworn to by Plaintiff-Appellant in a Declaration. (Flores Decl., ¶¶ 4(A)-(P)). Plaintiff-Appellant has disputed, contested, objected, or dispelled various aspects of Defendant's 56.1 Statement, an issue that the District Court (R. Mann) left unaddressed in

the Report and Recommendation. (PL 56.1 Answer ¶¶ 2, 7-10, 14, 16-17, 20, 23-24, 26, 29-31, 39-41, 43-45, 51-52, 59-63, 65, 79-80, and 82- 83.). Because the District Court did not resolve the genuine disputes of material facts, the Report and Recommendation should not have granted summary judgment to the DOJ, and this Court should reject the District Court's judgement based on the faulty Report and Recommendation.

The absence of facts, at the time Defendant provided its 56.1 Statement, included a failure to describe the searches for paper files in the prosecution of Lt. Choi. In the Agency's 56.1 Statement, the Government said that no records were found, and Plaintiff-Appellant noted that there were no facts to support this statement. (PL 56.1 Answer ¶54). The Government later admitted that there were records that were found -- six boxes of records, in fact. (Van Horn Decl., ¶ 11). These six boxes of records have been withheld and for which no *Vaughn* Index has been provided. Because the District Court, without any foundation, ruled that summary judgment was appropriate, even though Plaintiff-Appellant had protested over the material misrepresenations made by the Agency during the litigation, including the protestation that the Agency was only producing records upon the order or recommendation by the District Court, the District Court's action was in

contravention to civil procedure that holds that summary judgment is inappropriate procedure when materials "establish … presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact." Fed. R. Civ. P. 56(c)(1)(B).

Furthermore, the District Court refused to consider that when "nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition," the only appropriate procedural actions are : "(1) defer considering the motion or deny it ; (2) allow time to obtain affidavits or declarations *or to take discovery* ; or (3) issue any other appropriate order," none of which the District Court undertook. Fed. R. Civ. P. 56(d). (emphasis added). As stated over and over again, no ambiguity or absence of fact noted by Plaintiff-Appellant was ever resolved in favour of the nonmovant Plaintiff-Appellant -- not a single one. The only explanation can be judicial error. In particular, because the District Court denied Plaintiff-Appellant the ability to conduct limited Discovery, Plaintiff-Appellant had no opportunity to challege the material misrepresentations being made by the Government in filings that were entered into the record during the District Court's proceedings.

What is more, case law requires that when controversies arise over the withholding of records, "[a]ll doubts [are] resolved in favor of disclosure." *Bloomberg v. Bd. Of Governors of the Fed. Reserve System*, 601 F.3d 143, 147 (2d Cir. 2010). For example, this did not happen in respect of the request item in the First FOIA Request for the cost of the prosecution of Lt. Choi. Regarding costs requested in the First FOIA Request, the position of the Chief Magistrate Judge was frivolous in reaching a conclusion against the disclosure of costs. Plaintiff-Appellant requested records of the costs of the prosecution of Lt. Choi. (PL 56.1 Statement, ¶ 8(d)(i)(A)-(E)). The DOJ declared that no such records existed when it produced the Red Herring Response. (Flores Decl., Ex. F). Later, it was revealed that the DOJ had records of the costs, namely the costs that included all of the activists, who protested alongst with Lt. Choi, on the day he was arrested. (Kelly Decl., ¶ 22). Rather than make the DOJ undertake unnecessary work to calculate the portion of those costs associated with Lt. Choi, Plaintiff-Appellant offered as a compromise to accept the costs revealed by the DOJ's search. (Flores Decl., Ex. I at ¶ 1h). Using unfounded reasoning, the Chief Magistrate Judge concluded that it was "adequate" for the DOJ to withhold the records that the DOJ admitted existed and that Plaintiff-Appellant had offered to compromise to accept.

(Dkt. No. 48 at 24-5). Because the Chief Magistrate Judge refused to accept a compromise that would facilitate the ready disclosure of existing records about costs, the District Court violated the *Bloomberg* holding that "[a]ll doubts [are] resolved in favor of disclosure." Because the District Court violated this Court's holding in *Bloomberg*, this Court must remand the case and order the production of the cost records.

In order to refuse to confirm or deny the existence of guidelines, procedures, policies, and/or protocols for the prosecution of the activists, the Government has argued that the District Court "considered the entirety" of the First FOIA Request. (Gov't Brief at 31). The Government's assertion is patently false. The First FOIA Request comprised 18 itemized requests. (Dkt. No. 12 at Ex. II to Ex. C). (PL 56.1 Answer, ¶ 8). Plaintiff-Appellant has been seeking a complete itemized accounting by the DOJ for these 18 items. (Flores Decl., Ex. I at ¶ 1(i)). This request for itemization was also raised in the memorandum in support of Plaintiff's Motion for Partial Summary Judgment. (Dkt. No. 24 at 26). The Government has only directly addressed item I.1.C., item I.2.B., item I.3, and item I.4 (without complete itemisation) in one of its Declarations. (Kelly Decl. ¶¶ 18-20). However, the Chief Magistrate Judge narrowly construed the requests to only number 4. (Dkt. No. 48 at 3).

The District Court erred by not considering all 18 request items for which the Government has refused to account. Because Declarations that support the moving party's motion for summary judgment must described the searches that were made, the Declarations must be rejected, because no search has been described that itemises all 18 request items.

The Government does not dispute that the District Court resolved all ambiguities against Plaintiff-Appellant. Yet, contrary to the Government's arguments, Plaintiff-Appellant's arguments were not "without any support." (Gov't Brief at 32-33). Under the legal principle of *res ipsa loquitur*, the fact that all of the ambuguities that Plaintiff-Appellant argued existed, namely, about the absence of disputs of facts were all resolved in favour of the Government, and that all of the doubts about disclosure were never resolved in favour of disclosure, shows that the District Court adopted the summary judgement motion for the moving party without ever making any finding for the nonmoving party when civil procedure required the District Court to do so. Most importantly, the District Court wrongfully denied Discovery. Plaintiff-Appellant had

sought limited Discovery, precisely because of the Agency's misconduct.[3]/ In denying limited Discovery, the District Court made a procedural error, making it so that Plaintiff-Appellant was placed at a disadvantage, because Plaintiff-Appellant "cannot present facts essential to justify its opposition." Fed. R. Civ. P. 56(d).

By granting the Government's motion for summary judgment, the District Court effectively weakened FOIA, in particular since the District Court made the procedural error to refuse to consider the Government's failure to release its working law, which Plaintiff-Appellant has made a claim to be disclosed. In the Report and Recommendation, the Chief Magistrate Judge attempted to excuse the DOJ's withholding of its working law on the basis that Plaintiff-Appellant

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[3]/ The events and policies at the heart of this case are sensitive ones for the Government, especially in respect of Federal franchise rights, if activism and citizen participation in the shaping of public policy can be considered an extension of the Federal franchise, if not only being protected citizen activities under the First Amendment. But FOIA does not permit DOJ to withhold documents out of embarrassment or a desire to obscure its past failures. Limited discovery is warranted in precisely these circumstances. *Carney v. U.S. Dep't of Justice*, 19 F.3d 807, 812-3 (2d Cir. 1994) ; *cf. Jones v. FBI*, 41 F.3d 238, 243 (6th Cir. 1994) (greater scrutiny appropriate "where it becomes apparent that the subject matter of a request involves activities which, if disclosed, would publicly embarrass the agency"). Here, Plaintiff's claim under the First Amendment is critical.

was trying to amend the First FOIA Request "to encompass an entirely new category of documents." (Dkt. No. 48 at 28, n.17). The characterization given by the Chief Magistrate Judge to the working law is not supported by the record. The First FOIA Request encompassed 18 request items, four of which within the first category of documents would apply to working law. Plaintiff-Appellant made this argument in Plaintiff's Objection to the Report and Recommendation. (Dkt. No. 50 at 19-20). This Court must refuse to accept such an unjust, narrow reading of the First FOIA Request that would allow the Agency to refuse to produce documents that can be reasonably be expected of an Agency to search and produce, and this Court must instruct the District Court to compel the Agency to produce its working law.

The Government's admitted refusal to anwser the First FOIA Request (*See* "delay, which is undisputed," at Gov't Brief at 34), its actions to refuse to answer the FOIA Appeal, its admission of entering altered documents into the District Court's record, its pattern of producing a succession of Declarations that were each deemed insufficient and defective, its withholding of some paper records until the final Declaration was entered into the record, evidence bad faith acts and violations of both FOIA and the spirit of FOIA. Regarding the search of

paper files, Plaintiff-Appellant objected in the brief for his motion for partial summary judgement that the Agency, in one of its Declarations, faled to show or document how searches of paper documents and files was conducted. (Dkt. 24-1 at 28). In particular, it was disturbing to see the District Court refer to legal guidance that the Agency has received from the DOS as a "secret memo" that has not been shown to be a judical document. (Dkt. No. 48 at 32, n. 19). It is no secret. The legal advice given to the DOJ by the DOS is referenced in the United States Attorneys' Manual. *See* U.S. Dep't of Justice, *United States Attorneys' Manual* § 9-65.881. Additionally, Plaintiff-Appellant has explained how the legal guidance provided to the DOJ by the DOS is a judical record, and it is distrubing that the District Court failed to understand this argument and that the Government would deny that that legal advice (or "working law"), which will eventually influence charging documents against individuals, would not constitute judicial records. (Gov't Brief at 30).

The DOJ has produced at least two documents that clearly establish that the DOJ receives from other agencies legal guidance or interpretions of the law that the DOJ adopts and acts upon and informs the charges brought by the Agency against activists. In particular, the Agency produced the "Myers memo (email)" and "Capt. Guddemi's

November 22 email," two case specific documents that formed the basis of the charges or charging documents brought against Lt. Choi. (Flores Decl., Ex. G at Tabs A and B). These documents outline criminal charges or that call for criminal charges to be brought against activists. Because these documents relate to the prosecution of activists, these documents were responsive to the First FOIA Request. And because these documents form the basis of charging documents or of the legal reasoning for the prosecution of activists, these documents also serve as binding interpretations of agency law and were subject to disclosure, particularly to the extent that they may be deemed as judicial records. (Dkt. No. 30 at 2). Judicial records are discoverable under the First Amendment. *See also* U.S. Const. amend. I. The public has a right to access judicial documents, generally, and this right is protected by the First Amendment. *See United States v. Erie Cnty.*, 763 F.3d 235, 239 (2d Cir. 2014). Plaintiff-Appellant has made claims to the requested documents under the First Amendment. (Dkt. No. 12, Ex. I of Ex. C).

Furthermore, it is must be plainly evident to the Court that during criminal proceedings, the Defense generally can conduct Discovery of investigators to determine the nature of evidence used against Defendants, and this includes investigators' interpretations of the

evidence and the law. For example, when the DOJ recently restaffed the reported civil rights investigation of the homicide of Eric Garner, *The New York Times* reported that the reported target of the investigation would be able to call as witnesses investigators to testify about "their interpretations of the evidence."[4/] (Dkt. 50 at 40-41). Therefore, any DOJ documents that establish the predicate for the filing of criminal charges against activists -- and that includes the legal guidance from the DOS to the DOJ -- would receive treatment as judicial records in a criminal proceeding, and it is under the First Amendment treatment of those records that Plaintiff-Appellant seeks such records. *See also* U.S. Const. amend. I. *See United States v. Erie Cnty.*, 763 F.3d 235, 240 or 241 (2d Cir. 2014) (noting that, a District Court has "inherent 'supervisory power over its own records and files,' *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 597, 98 S.Ct. 1306, 55 L.Ed.2d 570 (1978), even the District Court's inaction is subject to public accountability. The public's ability to scrutinize such judicial decision-making helps assure its confidence in the orderly administration of justice."). Under this First Amendment legal

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4/ *See* Alan Feuer, *Staffing Change in Eric Garner Inquiry Pushes It Into 'Strange Territory,'* The New York Times (Oct. 25, 2016), http://www.nytimes.com/2016/10/26/nyregion/staffing-change-in-eric-garner-inquiry-pushes-it-into-strange-territory.html.

theory of judicial records or judicial documents, Plaintiff-Appellant requests the documents from the DOJ under the First FOIA Request and under Plaintiff's Index of References to Records Requested under FOIA Request. Because Plaintiff-Appellant has made a claim for some of the responsive documents under the First Amendment, the Government's bad faith acts and violations of laws requiring disclosure act as prior restraint on Plaintiff-Appellant, as Plaintiff-Appellant has argued before the District Court, which this Court must not ignore. Plaintiff has suffered actual adverse and harmful effects, including, but not limited to, a *de facto* prohibition on publishing information about the Government's prosecution of activists, which is tantamount to prior restraint, which is unconstitutional. *Near v. Minnesota*, 283 U.S. 697 (1931). The DOJ's actions deny Plaintiff the ability to make this information available to the public and to Plaintiff's readers, resulting in the creation of a chilling effect on speech from Defendant-Appellee's failure to comply with FOIA. (Dkt. No. 50 at 5).

If, however, the DOJ is correctly stating that no general guidelines for the prosecution of activists exist (which is in doubt, given the reference to guidelines in the Unites States Attorneys' Manual and given the Government's lack of credibility in these proceedings), then the

DOJ must provide its working law documents, as it did when it produced the "Myers memo (email)" and "Capt. Guddemi's November 22 email," two case specific documents that formed the basis of the charges or charging documents brought against Lt. Choi. (Flores Decl., Ex. G at Tabs A and B). Absent general guidelines, the DOJ has already produced two case-specific documents that revealed interpretations of the laws with which the DOJ has used to prosecute activists. Plaintiff-Appellant already provided examples of names of activists in the First FOIA Request, in the Complaint and in the Plaintiff's Index of References to Records Requested under FOIA Request. (Dkt. No. 12 at Ex. I to Ex. C). (Dkt. No. 15). (Flores Ex., Ex. L). Since the DOJ had said it had not found any responsive records to the First FOIA Request, Plaintiff-Appellant hoped that, by providing examples of names of other activists, who had been prosecuted for their activism, it would make it easier for the DOJ to locate and produce these records. (PL 56.1 Answer ¶ 40). Therefore, in the alternative of providing general guidelines, which, as the DOJ claims, may not exist, then the DOJ should produce the equivalent of the "Myers memo (email)" and "Capt. Guddemi's November 22 email" for all of the activists that Plaintiff-Appellant has identified in the in the Complaint and in the Plaintiff's Index of References to Records Requested under FOIA Request, so that the

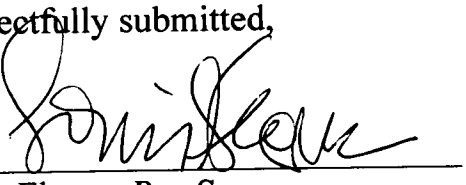
public can benefit from the disclosure of the DOJ's working law applicable to the specific prosecution of activists. These documents should be provided under Plaintiff-Appellant's (i). FOIA claim to these documents ; and (ii). First Amendment claim to these documents as judicial documents or judicial records.

As argued by Plaintiff-Appellant, this Court must confront the contradictory situation created by the Government : (a) the top-most U.S. Government officials have made public statements declaring that citizens have a right to engage in activism ; (b) DOJ has prosecuted activists ; and (c) the Government refuses to disclose all of the records that indicate when the DOJ can prosecute activists, despite citizens having a right to participate in their own Government, particularly under activists' First Amendment-protected political organizing that are enshrined as freedoms by the rights to free speech and free association. *See also* U.S. Const. amend. I. There is substantial public interest in guaranteeing the press's and the citizen's rights to First Amendment-protected documents and activities, and this substantial public interest compels the Government to disclose its guidelines, procedures, policies, and/or protocols for the prosecution of the activists.

V. CONCLUSION

For the foregoing reasons, Plaintiff-Appellant prays that this Court use its discretion to review this case *de novo* and find that the District Court erred in issuing its Judgment, to remand this case back to the District Court with instructions that the Government deliver the relief claimed by Plaintff-Appellant in Plaintiff's Motion for Partial Summary Judgment (Dkt. No. 25-1 at 42), and that the District Court be instructed to impose sanctions and penalties on the Government for its wilfull and reckless violation of FOIA, in accordance to the relief claimed by Plaintiff-Appellant in the Rule 52 Motion. (Dkt. No. 25-1 at 43-4).

Respectfully submitted,



Louis Flores, *Pro Se*
Plaintiff-Appellant

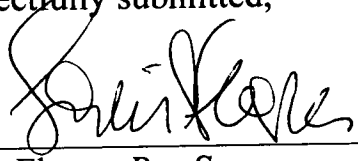
VI. CERTIFICATE OF COMPLIANCE

I, **LOUIS FLORES**, declare under penalty of perjury that :

1/. The Brief complies with the type-volume limit of Fed. R. App. P. 32(a)(7)(B), because, excluding the parts of the documents exempted by Fed. R. App. P. 32(f), this document contains 5 345 words.

2/. These documents comply with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6), because these documents have been prepared in a proportionally spaced typeface using Microsoft Word for Mac 2011 in 14 pt. Cambria.

Respectfully submitted,



Louis Flores, *Pro Se*
Plaintiff-Appellant

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

LOUIS FLORES,

Appellant-Plaintiff,

v.

UNITED STATES DEPARTMENT OF JUSTICE,

Respondent-Defendant.

EDNY : 15-CV-2627
2d Cir : 17-0428

CERTIFICATE OF SERVICE

I, **LOUIS FLORES**, declare under penalty of perjury that on **06 DECEMBER 2017** I have served a copy of the attached document :

Sur-Reply Brief of Appellant Louis Flores

by **E-MAIL ONLY** to : **rukhsanah.singh@usdoj.gov** on the following party at :

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